

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FIDEL C. HERNANDEZ, ) No. C 08-2539 JSW (PR)  
Petitioner, )  
vs. ) **ORDER DENYING PETITION  
FOR A WRIT OF HABEAS CORPUS  
AND DENYING CERTIFICATE OF  
APPEALABILITY**  
MATHEW KRAMER, Warden, )  
Respondent. )

## INTRODUCTION

Fidel C. Hernandez, a prisoner of the State of California, has filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his state conviction. This Court ordered Respondent to show cause why the petition should not be granted. Respondent filed an answer and a memorandum of points and authorities in support of it, and lodged the record. Petitioner filed a traverse. This order denies the petition for a writ of habeas corpus on the merits.

## PROCEDURAL BACKGROUND

Petitioner was convicted in Santa Clara Superior Court of second degree murder with personal use of a firearm. The conviction was reversed on appeal. At the retrial, Petitioner was again convicted. The trial court sentenced him on December 2, 2005, to a term of twenty-five years to life in state prison. The Court of Appeal of California affirmed and the Supreme Court of California denied review. Petitioner also filed several state habeas petitions, all of which were denied.

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## FACTUAL BACKGROUND

The following statement of the facts is taken from the opinion of the California Court of Appeal on Petitioner's first appeal. *See People v. Hernandez*, No. H025946, 2004 WL 2407226 (Cal. App. 2004) (hereafter cited as "*Hernandez I*").<sup>1</sup> Petitioner concedes that these are the appropriate facts to be considered here. (Trav. at 3).

Defendant and his brother-in-law Jose Magana worked at Patino's Auto Body Shop in San Jose. They were also drug traffickers. Generally, they stored the drugs and drug money in a locker at a public storage facility. Many relatives believed that defendant and Magana got along well with each other. Indeed, their families lived together occasionally in Bakersfield and San Jose, and defendant and Magana often traveled together. However, in December 2001, some fellow employees heard them argue. Defendant accused Magana of theft; and Magana told defendant to behave himself "or else." Before Christmas 2001, defendant complained to a relative that Magana did not pay him enough. Defendant also said he wanted to make enough money to leave the drug business and return to Mexico.

On January 14, 2002, at around 7:00 p.m., defendant and Magana met in two cars at a cul-de-sac outside the public storage facility. They had come to retrieve some drugs from the locker. Magana brought his friend Efren Aguilar. At around this time, Linda Young, who was working at the facility, saw a Mexican man leaning into the window of another car and talking to the driver. The man then entered the car, and it drove into the facility. Minutes later, Young heard gunshots. Around this time, Aguilar called Magana's wife. He said Magana had been shot, and defendant had left the facility. At 8:00 p.m., defendant arrived at the home of a coworker Jose Adrian Zerpas Mendoza. Defendant said that he and Magana had fought over drugs. Defendant also said he had thrown his gun into a dumpster at Mendoza's building. Mendoza retrieved it and said he would sell it. However Mendoza was unable to sell the gun and threw it back into the dumpster a few days later. About one week later, defendant called Magana's niece a few of times. He told her that two drug robbers had shot Magana in the head and in the leg. He also said that a suspicious red truck had been parked at the facility that night, and police had shot and killed Magana.

On the morning of January 15, 2002, police found Magana's body in the hallway of the storage facility. He had been shot eight times with a nine-millimeter gun, once in the back, four times on the right side of his chest, and three times in head. Given the nature and location of the wounds, the coroner opined that Magana had been shot first in the back. This shot ruptured the main arteries coming from Magana's heart. The rest of the shots occurred after Magana had fallen to the ground. One shot pierced Magana's hand, indicating a defensive wound. The shots had been fired from two to seven feet

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<sup>1</sup> In his appeal from his conviction after reversal and retrial, the conviction to which this habeas petition is directed, the court did not set out the facts because they were not relevant to the issues in that appeal. *See People v. Hernandez*, No. H029683, 2006 WL 3313635 at \*1 n.3 (Cal. App. 2006) ("*Hernandez II*").

1 away. The tight pattern of the shots indicated that the gun had been  
 2 deliberately aimed. There was a ninth shot that passed through the wall above  
 3 Magana's head. Police also found two live rounds, indicating that when they  
 4 failed to fire, defendant had manually ejected them.

5 On January 27, 2002, police arrested defendant. He waived his *Miranda* [FN1.  
 6 *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.]  
 7 rights and was interrogated for three hours. [FN2. Tapes and transcripts of the  
 8 interrogation were introduced into evidence, but the tapes were not played for  
 9 the jury. Sergeant Ed Zarate of the San Jose Police Department also testified  
 10 about what defendant said during the interrogation.] He first told police that  
 11 he had seen a suspicious truck at the storage facility and went to check on it.  
 12 He said that later, he saw and heard two Latino men shoot Magana and take  
 13 heroin and money. The officers disbelieved defendant and said they had  
 14 surveillance tapes showing that no one else had been in the facility. They  
 15 repeatedly asked defendant whether Magana had threatened him. Defendant  
 16 then explained that around Christmas, he had temporarily hidden a shipment  
 17 of heroin at Patino's because the storage facility was closed for the holidays.  
 18 However, someone stole the drugs. When defendant told Magana, Magana  
 19 refused to help him and threatened defendant and his family if defendant did  
 20 not find the drugs or pay for them. Later, fearful for himself and his family,  
 21 defendant falsely told Magana that he had returned the drugs to the locker.  
 22 Magana then insisted they go there. Defendant was reluctant. They argued as  
 23 they drove there, and Magana warned defendant that the drugs had better be  
 24 there. Defendant assured him but feared Magana was going to kill him when  
 25 he discovered the drugs were not there. Defendant did not know whether  
 26 Magana had a gun with him at the time.

27 Defendant explained that he had bought a Ruger nine-millimeter handgun a  
 28 couple of days earlier, loaded it, and later concealed it under his clothing when  
 he and Magana headed to the storage locker. He knew Magana would not find  
 the drugs and knew Magana was looking for a weapon, and so defendant shot  
 him. He said he simply reacted to the fear. After Magana fell to the ground,  
 defendant closed his eyes and continued to shoot. He said he intended only to  
 paralyze him to prevent him from carrying out his threats.

### 19 ***The Defense***

20 Defendant testified that both he and Magana carried guns when conducting  
 21 drug business. He reiterated his story that around Christmas, someone stole a  
 22 shipment of drugs he had temporarily hidden at Patino's. He said Magana had  
 23 refused to help him and had instead warned him to pay for the drugs or else  
 24 something would happen to him or his family.

25 In early January, Magana reiterated his threat, saying he would kill him or his  
 26 family if he did not find the drugs. Defendant testified that Magana had  
 27 threatened other people in the past. Defendant said that whenever the subject  
 28 of the missing drugs came up, Magana got angry. Around this time, defendant  
 bought a nine millimeter semi-automatic because he became frightened by  
 Magana's threats.

On the day of the shooting, defendant told Magana he had found the drugs.  
 Magana wanted to go check, and they drove to the storage facility in different  
 cars. When defendant arrived, he loaded his gun and chambered a round.  
 Magana arrived with Efren Aguilar, and then defendant and Magana drove into

1 the facility together. At this time, defendant told Magana the truth: The drugs  
 2 were not there. Magana said he knew but nevertheless warned that defendant  
 3 would have to pay one way or the other if the drugs were not there. Defendant  
 4 wanted to go to the locker at another time, but Magana insisted, saying he  
 5 wanted to see defendant's expression and hear what defendant had to say at the  
 6 empty storage locker. Magana seemed more upset than before, and defendant  
 7 believed Magana would shoot him because the drugs were not in the locker.  
 8 So, when he and Magana got out of the car, he took his gun. He testified that  
 9 Magana saw him take it. As they headed to the locker, defendant repeated that  
 10 the drugs were not there and asked why Magana still wanted to go. Magana  
 11 again said he knew but wanted defendant to explain himself. According to  
 12 defendant, Magana had his hand in his pocket. However, defendant did not  
 13 know whether Magana had a weapon. Defendant explained that because  
 14 Magana was threatening to kill him right then and there if the locker was  
 15 empty, defendant thought he was about to be killed. Consequently, he drew his  
 gun and shot Magana. [FN3. Officer Zarate testified that during the  
 interrogation defendant said that just before he fired, he thought Magana was  
 looking for a weapon, suggesting that he was looking for one in the storage  
 locker. Indeed, on appeal, defendant argues that he shot Magana after Magana  
 opened the locker and saw that it was empty. However, defendant's citations  
 to the record do not establish this. Rather, when read together, defendant's  
 interview, Officer Zarate's testimony, and defendant's testimony more  
 consistently indicate that defendant shot Magana as they headed to the locker.]  
 Defendant admitted that he intended to do so. After Magana fell, defendant  
 closed his eyes and continued to shoot without aiming. Defendant denied that  
 he planned to kill Magana and went to the storage facility for that purpose. He  
 said he did not shoot Magana to kill him but merely to scare him away. After  
 the shooting, defendant left the locker area, took a circuitous path to the cars,  
 told Aguilar that two men had shot Magana, and then fled.

16 Defendant could not say why the unexpended rounds were on the floor near  
 17 Magana's body. He admitted lying to many people, including the police, about  
 18 the details of what happened the night of the shooting. He explained that he  
 lied to police because he wanted to protect others and did not believe the  
 police would help him.

19 *Id.* at \*1-3.

## 20 DISCUSSION

### 21 I. Evidentiary Hearing

22 Petitioner asks for an evidentiary hearing in his petition and in his traverse. The  
 23 request in the petition was denied in the court's order to show cause "without prejudice to  
 24 the Court's *sua sponte* reconsideration when considering the merits of the petition."

25 An evidentiary hearing is held in federal habeas cases only under the most limited  
 26 circumstances. *Baja v. Ducharme*, 187 F.3d 1075, 1077-79 (9th Cir. 1999). An  
 27 evidentiary hearing on a claim for which the petitioner failed to develop a factual basis in  
 28 state court can be held only if petitioner shows that: (1) the claim relies either on (a) a

1 new rule of constitutional law that the Supreme Court has made retroactive to cases on  
 2 collateral review, or (b) a factual predicate that could not have been previously discovered  
 3 through the exercise of due diligence, and (2) the facts underlying the claim would be  
 4 sufficient to establish by clear and convincing evidence that but for constitutional error,  
 5 no reasonable fact finder would have found the applicant guilty of the underlying offense.  
 6 28 U.S.C. § 2254(e)(2)(A)-(B). In short, if petitioner did not attempt to present in state  
 7 court the facts he wishes to present now, for instance by attempting to develop them in his  
 8 state habeas proceedings, he cannot do so now unless he can show that he meets the  
 9 provisions of section 2254(e)(2) outlined above.

10 A prisoner "fails" to develop the factual basis of a claim, triggering § 2254(e)(2), if  
 11 "there is lack of diligence, or some greater fault, attributable to the prisoner or the  
 12 prisoner's counsel." *Williams (Michael) v. Taylor*, 529 U.S. 420, 432 (2000). "Diligence  
 13 will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing  
 14 in state court in the manner prescribed by state law." *Id.* at 437. Accordingly, where the  
 15 prisoner has met the burden of showing he was diligent in efforts to develop the facts  
 16 supporting his claims in state court, an evidentiary hearing may be held without regard to  
 17 whether the "stringent" requirements of § 2254(e)(2) apply. *See id.* at 437; *Jaramillo v.*  
 18 *Stewart*, 340 F.3d 877, 882 (9th Cir. 2003); *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir.  
 19 1997).

20 It is petitioner's burden to show that he attempted to develop the facts in state court  
 21 but was prevented from doing so, for instance by the state court's denial of an evidentiary  
 22 hearing. *Hutchison v. Bell*, 303 F.3d 720, 747 (6th Cir. 2002)(requiring petitioner to  
 23 demonstrate "sufficient diligence"); *Baja*, 187 F.3d at 1078-79.

24 Petitioner does not even address the issue of whether he attempted to develop the  
 25 facts in state court; he simply writes "evidentiary hearing requested." He thus has not  
 26 carried his burden to show that he acted with due diligence in attempting to develop the  
 27 facts in state court, whether by requesting an evidentiary hearing in state court or  
 28 submitting declarations there. He also has not attempted to show that the exceptions of

1 Section 2254(e)(2)(A)-(B) apply to him. The motion for an evidentiary hearing will be  
 2 denied.

3 **II. Merits**

4 As grounds for habeas relief, Petitioner contends that: (1) his statement to police  
 5 was coerced and was taken in violation of his *Miranda* rights; (2) admission of a  
 6 witnesses statement violated his confrontation rights; (3) admission of the testimony of  
 7 three witnesses deemed unavailable without adequate investigation violated his  
 8 confrontation rights; (4) there was insufficient evidence to sustain the convictions; (5)  
 9 there was prosecutorial misconduct; (6) his trial counsel was ineffective; and (7) his  
 10 appellate counsel was ineffective.

11 **A. Standard of Review**

12 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), codified  
 13 under 28 U.S.C. § 2254, provides “the exclusive vehicle for a habeas petition by a state  
 14 prisoner in custody pursuant to a state court judgment, even when the petitioner is not  
 15 challenging his underlying state court conviction.” *White v. Lambert*, 370 F.3d 1002,  
 16 1009-10 (9th Cir. 2004). Under the AEDPA, this court may entertain a petition for  
 17 habeas relief on behalf of a California state inmate “only on the ground that he is in  
 18 custody in violation of the Constitution or laws or treaties of the United States.” 28  
 19 U.S.C. § 2254(a).

20 The writ may not be granted unless the state court’s adjudication of any claim on  
 21 the merits: “(1) resulted in a decision that was contrary to, or involved an unreasonable  
 22 application of, clearly established Federal law, as determined by the Supreme Court of the  
 23 United States; or (2) resulted in a decision that was based on an unreasonable  
 24 determination of the facts in light of the evidence presented in the State court  
 25 proceeding.” *Id.* at § 2254(d). Under this deferential standard, federal habeas relief will  
 26 not be granted “simply because [this] court concludes in its independent judgment that the  
 27 relevant state-court decision applied clearly established federal law erroneously or  
 28 incorrectly. Rather, that application must also be unreasonable.” *Williams v. Taylor*, 529

1 U.S. 362, 411 (2000).

2 While circuit law may provide persuasive authority in determining whether the  
 3 state court made an unreasonable application of Supreme Court precedent, the only  
 4 definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the  
 5 holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court  
 6 decision. *Id.* at 412; *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

7 **B. Statement to Police**

8 Petitioner contends that his confession to police was coerced and was taken in  
 9 violation of his *Miranda*<sup>2</sup> rights.

10 Petitioner's first *Miranda* claim is that his due process rights were violated when  
 11 he was not told that he had a right to an attorney before questioning and a right to have  
 12 the attorney present during questioning. His second *Miranda* claim is that the police  
 13 undermined the *Miranda* advisement about his right to counsel by their later comments.

14 The second of these *Miranda* claims was raised and rejected in Petitioner's first  
 15 appeal. *Hernandez I* at \*3-4. In his second appeal he raised the same claim again, and  
 16 the court rejected it on law of the case grounds. *Herndandez II* at \*1.

17 **1. First Miranda Claim**

18 The transcript of the police interview at which Petitioner confessed does not  
 19 include the *Miranda* warnings. (See Ex. 2 at 2-5.) The transcript begins with the words  
 20 (translated into English): “– if you want, do you understand that right?” (*Id.* at 2.) One  
 21 of the officers who interrogated Petitioner testified at trial that the warning was not on the  
 22 tape because he thought his partner had started the recorder, so he did not start it until he  
 23 was into the warning. (Ex. 3, vol. 6 at 547.) The officer testified that he read the warning  
 24 from the official police department *Miranda* warning card. (*Id.*)

25 Petitioner first made this contention in a state petition for habeas corpus, so it was  
 26 not at issue in his direct appeals. (Ex. 14 at 24.) Nevertheless, in its opinion on

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28 <sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966)

1 Petitioner's first appeal the court of appeal stated in passing that "[Petitioner]  
 2 acknowledges that police initially gave proper *Miranda* advisements, and he voluntarily  
 3 waived his rights and agreed to talk." (*Hernandez I* at \*3.)

4 The only evidence as to whether Petitioner in fact received the full warning is that  
 5 mentioned above. The rejection of the purely factual claim by the state courts was an  
 6 implied finding of fact that the full warning was given, though not recorded. On the  
 7 evidence available, the Court cannot say that this was an unreasonable determination of  
 8 the facts in light of the evidence. *See* 28 U.S.C. § 2254(d)(2) (AEDPA standard of review  
 9 for findings of fact). This claim is without merit.

10 **2. Second *Miranda* Claim**

11 Petitioner also contends that some of the detectives' later comments in the  
 12 interview had the effect of undermining the *Miranda* advisements by suggesting that he  
 13 did not have an immediate right to an attorney. This claim was raised on direct appeal.  
 14 The court of appeal said this about it:

15 Defendant contends the court erred in denying his motion to exclude some if  
 16 not all of his confession. He acknowledges that police initially gave proper  
 17 *Miranda* advisements, and he voluntarily waived his rights and agreed to talk.  
 18 However, he notes that during the first two hours of his interrogation, he made  
 19 some comments about an attorney. [FN 4. During the interrogation, defendant  
 20 asked the officers if he was the only suspect. When they did not answer, he  
 21 said, "I know it ... I ... I was going to get an attorney I don't have money...."  
 22 Later, he related a conversation with a friend, saying "I'm afraid dude I say to  
 23 him I don't know I want to see an attorney I say to him I'm going to ... in fact  
 24 he tells me I'm going to hire you an attorney, I said to him ... I said to him I  
 25 don't believe you ... all ... I said to him, I don't have money...." Later, defendant  
 26 asked, "Okay, the county give me an attorney, no?" One officer said that they  
 27 do. A short time later, when told to start again from the beginning, defendant  
 28 asked, "And why don't I tell it to an attorney." One officer replied, You could  
 do it ... and you could tell it in court too that's all ... all ... what happens now is  
 that you could tell it to anyone you want." Defendant said he understood. The  
 officer then said, "But what we are telling you we are the ones doing the case  
 first." (Italics added.)] Defendant concedes that these comments, individually  
 and collectively, were not an unambiguous invocation of his right to counsel,  
 which would have required the officers to stop the interrogation. (See *Davis v.*  
*United States* (1994) 512 U.S. 452, 459, 461-462, 114 S.Ct. 2350, 129 L.Ed.2d  
 362; *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68  
 L.Ed.2d 378.) However, he asserts that his comments show that he wanted an  
 attorney, he was "genuinely confused about the criminal process," and he  
 "naively hoped [the police] might help him." Focusing on the officer's final  
 comment that "we are the ones doing the case first," defendant argues that the  
 investigator erroneously implied that defendant could not talk to an attorney

1 until after the interrogation was over. He claims that this implication corrupted  
 2 the initial Miranda warnings and nullified his waiver.

3 First, in our view, defendant's various comments about attorneys during his  
 4 long interrogation do not demonstrate that he was confused about "the criminal  
 5 process" in general or any of his *Miranda* rights in particular. After saying he  
 6 understood his rights and then waiving them, he did ask whether the county  
 7 would appoint an attorney. At most, however, this question seeks to confirm  
 8 what he had already been told and said he understood. Indeed, defendant did  
 9 not then ask when one would be appointed or otherwise indicate that he wanted  
 10 an attorney at that time. The record also rebuts defendant's assertion that he  
 11 naively believed the officers. As noted, defendant testified that he lied during  
 12 the interrogation because he did not believe the officers when they said they  
 13 were going to help him.

14 Last, we disagree with defendant's interpretation of the officer's comment about  
 15 "doing the case first." After being advised of his rights, defendant did not ask  
 16 any questions about them. Rather, he said he understood them and waived  
 17 them. He then spoke to police for two hours, lying about what happened. As  
 18 noted, when police confirmed that the county would appoint a lawyer if he  
 19 could not afford one, defendant did not request counsel or ask when or how one  
 20 would be appointed at that time. Thereafter, defendant rhetorically asked, "And  
 21 why don't I tell it to an attorney." The officer correctly told him he could do so  
 22 and that he could also tell the judge. Again, defendant did not say he wanted to  
 23 stop the interrogation or suggest that he wanted a lawyer. Consequently, the  
 24 officers had no reason to think that defendant was trying to invoke his *Miranda*  
 25 rights or that he had any questions about the meaning and scope of his right to  
 26 consult with an attorney. Rather, they could still reasonably rely on both  
 27 defendant's statement that he understood his rights and his express waiver.  
 Thus, when we view the investigator's comment about "doing the case first" in  
 context, it simply reflects the circumstances as they appeared to the officer at  
 the time: Defendant had waived his rights, and the police were talking to  
 him-i.e., doing his case-first.

18 We recognize that the inference defendant draws is not unreasonable. However,  
 19 the officer's comment was not a response to defendant's request for an attorney  
 20 or his indication that he no longer wanted to talk to the police. Nor did the  
 21 comment prevent defendant from asserting his *Miranda* rights or necessarily  
 22 convey that defendant could not immediately stop the interrogation so he could  
 23 consult with an attorney. Accordingly, we do not find that the brief, arguably  
 24 misleading, comment vitiated the *Miranda* warnings, negated defendant's  
 25 waiver, and thereby rendered his subsequent statements involuntary.

26 Defendant's reliance on *Pope v. Zenon* (9th Cir.1995) 69 F.3d 1018 does not  
 27 change our view of the record. There, the defendant was advised of his right to  
 consult an attorney before being questioned. He immediately asked whether  
 that meant he got an attorney at that moment. A detective told him that an  
 attorney would be appointed the next day at his arraignment. The Ninth Circuit  
 Court of Appeal found that the detective knew the defendant was asking about  
 his right to consult an attorney before the interrogation started, and the  
 detective's response was so misleading that it nullified the previous and correct  
*Miranda* advisement and vitiated the defendant's subsequent waiver. (*Id.* at pp.  
 1022, 1024.)

28 *Pope* is distinguishable. Here, defendant did not ask any questions about his

1 rights when they were first read to him. His various brief comments over the  
 2 course of a lengthy interview do not show that he was confused about his right  
 3 to consult with an attorney before talking to police. And, in context, the  
 4 officer's last comment did not purport to be an explanation of or statement  
 5 about defendant's rights, let alone a misleading and erroneous limitation of his  
 6 rights.

7 (Hernandez I at \*3-\*4.)

8 Petitioner made two comments indicating he was thinking about a lawyer: "I was  
 9 going to get an attorney I don't have money" and "I don't know I want to see an attorney"  
 10 in describing what he had said to a friend.<sup>3</sup> As Petitioner does not contend that he  
 11 unequivocally invoked his right to counsel, neither of these bears on this claim. He also  
 12 asked two questions regarding an attorney: "Okay, the county give me an attorney, no?"  
 13 and "why don't I tell it to an attorney?" The first question was correctly answered "yes,"  
 14 without any additional comments that would reduce the impact of the *Miranda*  
 15 advisements, so it also is irrelevant. The last of the questions, "why don't I tell it to an  
 16 attorney," however, lies at the heart of Petitioner's argument.

17 In response to the "why don't I tell it to an attorney" question, Officer Zarate  
 18 answered: "You could do it ... and you could tell it in court too that's all ... all ... what  
 19 happens now is that you could tell it to anyone you want." Defendant said "Uh huh." The  
 20 officer then said, "But what we are telling you we are the ones doing the case first." (Ex.  
 21 2 at 223-24.) The issue here boils down to whether the officer's telling Petitioner "we are  
 22 the ones doing the case first" negated, or at least fatally weakened, the otherwise-adequate  
 23 *Miranda* warning that he had a right to counsel before answering any questions.

24 Two case are informative. One, *Pope v. Zenon*, 69 F.3d 1018 (9th Cir. 1995),  
 25 overruled on other grounds by *United States v. Orso*, 266 F.3d 1030, 1038-39 (9th Cir.  
 26 2001) (en banc), is relied upon by Petitioner and was distinguished by the court of appeal.  
 27 *Hernandez I* at \*4.

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28 <sup>3</sup> The interrogation actually was conducted in Spanish; the quotations here are  
 29 from the English translation introduced at trial.

1 Because *Pope* was overruled by *Orso*, it is necessary to consider at the outset  
 2 whether it was overruled on the point for which Petitioner cites it.

3 The general rule is that *Miranda* violations are not subject to “fruit of the poisonous  
 4 tree” analysis, so interrogators could obtain a confession without giving *Miranda*  
 5 warnings, then give the warnings and obtain the confession again, and the second  
 6 confession would not be excluded unless either it or the first confession were found to be  
 7 involuntary.<sup>4</sup> See *Orso*, 266 F.3d at 1034-35. In *Pope* the Ninth Circuit disapproved of  
 8 that procedure, holding that in the two-step interrogation at issue in that case the second  
 9 confession should have been suppressed, even though voluntary, as “the direct and  
 10 unmistakable product of impermissible interrogation.” *Pope*, 69 F.3d at 1025. It is clear  
 11 that *Pope* was overruled by *Orso* on this point. See *Orso*, 266 F.3d at 1036-40.

12 There also was another issue in *Pope*: the suspect had asked if he was entitled to an  
 13 attorney “now,” and been answered by the officers that he would get one when he went to  
 14 court the next day. *Pope*, 69 F.3d at 1023. The Ninth Circuit condemned this as  
 15 undermining the portion of the *Miranda* warning that tells the suspect that he or she has  
 16 the right to an attorney before answering any questions. *Id.* at 1024-25. The court  
 17 distinguished *Duckworth v. Eagan*, 492 U.S. 195 (1988), which is discussed below, on  
 18 grounds that Pope “asked a specific question about his right to have a lawyer present  
 19 before and during questioning.” *Pope*, 69 F.3d at 1024 (emphasis in original). It is not  
 20 entirely clear, but for purposes of this discussion the Court will assume that this was an  
 21 alternative basis for the result in *Pope*, and that this part of the *Pope* holding survived the  
 22 overruling in *Orso*.

23 In *Duckworth*, the suspect was given *Miranda* warnings that informed him he had a  
 24 right to an attorney before answering any questions, but also told him that an attorney

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 26 <sup>4</sup> Because the interrogation here was not a two-step interrogation, and this  
 27 description is provided only as background to the *Pope* opinion, subsequent  
 developments in the law applicable to two-step interrogations are omitted. See *United  
 States v. Williams*, 435 F.3d 1148, 1152-61 (9th Cir. 2006) (discussing appropriate  
 28 interpretation of *Missouri v. Seibert*, 542 U.S. 600 (2004)).

1 could not be provided until “you go to court.” 492 U.S. at 198. The Court held that the  
 2 “go to court” language did not negate the advisement about having a right to an attorney  
 3 before answering questions. *Id.* at 204-05.

4 Petitioner’s argument is that *Pope* established that telling a suspect that he will  
 5 receive a lawyer later negates the *Miranda* advisement that the suspect has a right to an  
 6 attorney before answering questions, thus making a subsequent confession inadmissible.

7 Here Petitioner said “maybe I should tell it to an attorney” and the police responded  
 8 that he could do so, but that “we are the ones doing the case first.” Petitioner’s statement  
 9 at issue here was not a question, and the response was not the sort of flat statement that an  
 10 attorney would only be provided later that was at issue in *Pope*. Furthermore, the very  
 11 point upon which the *Pope* court distinguished *Duckworth* is not present – here, Petitioner  
 12 did *not* ask a “specific question about his right to have a lawyer present *before and during*  
 13 *questioning.*” *Pope*, 69 F.3d at 1024-25. The Court concludes that the result here is  
 14 controlled by *Duckworth*, not *Pope*. The questioners’ “doing the case first” statement did  
 15 not render their *Miranda* warning ineffective. There was no *Miranda* violation, so the  
 16 state courts’ rejections of this claim were not contrary to, or an unreasonable application  
 17 of, clearly established Supreme Court authority.

18                   **3.       Coercion Claim**

19 Petitioner also contends that his confession was coerced by promises made by the  
 20 interrogating officers.

21 Involuntary confessions in state criminal cases are inadmissible under the  
 22 Fourteenth Amendment. *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960). The  
 23 voluntariness of a confession is evaluated by reviewing both the police conduct in  
 24 extracting the statements and the effect of that conduct on the suspect. *Miller v. Fenton*,  
 25 474 U.S. 104, 116 (1985); *Henry v. Kernan*, 197 F.3d 1021, 1026 (9th Cir. 1999). Absent  
 26 police misconduct causally related to the confession, there is no basis for concluding that a  
 27 confession was involuntary in violation of the Fourteenth Amendment. *Colorado v.*  
 28 *Connelly*, 479 U.S. 157, 167 (1986); *Norman v. Ducharme*, 871 F.2d 1483, 1487 (9th Cir.

1 1989). A confession is rendered involuntary “having been extracted as the result of a  
 2 promise of leniency made by the interrogating officers.” *Moore v. Czerniak*, 574 F.3d  
 3 1092, 1101& n.10 (9th Cir. 2009). “The test is whether, considering the totality of the  
 4 circumstances, the government obtained the statement by physical or psychological  
 5 coercion or by improper inducement so that the suspect’s will was overborne.” *United*  
 6 *States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988) (citing *Haynes v.*  
 7 *Washington*, 373 U.S. 503, 513-14 (1963)).

8 Petitioner contends that his confession was involuntary because it was induced by  
 9 promises made by the interrogating officers. These are the statements upon which he  
 10 relies:

11 (1) Officer Zarate told Petitioner that Petitioner was minimizing what happened,  
 12 that Zarate could prove the crime did not happen the way Petitioner said it did, and that  
 13 Petitioner was going to “be in a lot of trouble” if Zarate had to go to the judge with  
 14 Petitioner’s explanation and the evidence Zarate had (Ex. 2 at 171-72);

15 (2) Zarate told Petitioner that he could give no guarantees about what would  
 16 happen if Petitioner told the truth, but that he would tell the judge what happened, that  
 17 Petitioner cooperated, and when Petitioner said that he would get the same amount of time  
 18 no matter what, Zarate said that there were degrees of homicide, “like up to five” (*id.* at  
 19 196-97);

20 (3) Petitioner interprets the “like up to five” statement in item (3) above as being a  
 21 promise he would receive only five years if he told the truth;

22 (4) Zarate told Petitioner that if Petitioner did not tell the truth Zarate would “think  
 23 the worst” and “present the worst” (*id.* at 202-03);

24 (5) the officers said that when Petitioner had explained the reason for the killing,  
 25 they would go to the judge and say that Petitioner was a “good person,” had a wife and  
 26 children, and did not “run off to Mexico” (*id.* at 273);

27 (6) the officers said that pencils have erasers because humans make mistakes, and  
 28 that the way for Petitioner to erase the mistake he made was to tell the truth (*id.* at 200);

1       (7) Petitioner asked Zarate about “guarantees” that the officers would “help” him,  
 2 and Zarate explained that he meant he would investigate what Petitioner told him, write it  
 3 out, and show it to a judge, and explicitly said that he could not “promise” anything (*id.* at  
 4 212-13); and

5       (8) the officers told Petitioner that what he had said up to that point did not fit the  
 6 facts and that they would put in their report that Petitioner did not tell the truth (*id.* at 213).

7       The last reasoned opinion on this issue was that of the Santa Clara Superior Court,  
 8 in which the court held that the officers’ statements were not promises of leniency, but  
 9 rather explanations of possible consequences if Petitioner were to tell the truth. (Ex. 15 at  
 10 2.)

11       Encouraging a suspect to tell the truth is not coercion. *Amaya-Ruiz v. Stewart*, 121  
 12 F.3d 486, 494 (9th Cir. 1997). Most of the police statements to Petitioner set out above  
 13 fall into this category, namely (1), (2) (4) (6) and (7), though some fall into more than one  
 14 category.

15       Nor is it coercive to accurately recite consequences. *United States v. Haswood*, 350  
 16 F.3d 1024, 1029 (9th Cir. 2003) (potential penalties or sentences). Statements (1) and (8)  
 17 fall into this category.

18       Nor is it police misconduct for officers to indicate that a cooperative attitude would  
 19 be to the benefit of an accused, unless such remarks rise to the level of being threatening.  
 20 *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir. 2005). Statements (5) and (7) fall into this  
 21 category.

22       Statement (3), which falls into none of the above categories, is simply a  
 23 misinterpretation of the officer’s statement, which clearly was about how many degrees of  
 24 homicide there are, not that if Petitioner confessed he would receive only five years in  
 25 prison. The officer’s point was that, depending on Petitioner’s reason for the killing, he  
 26 might receive less time than if it were, for instance, first degree homicide. This was an  
 27 accurate statement.

28       The ultimate issue here is whether the statements by the officers amounted to

1 coercion that overbore Petitioner's will and caused him to confess involuntarily. *See*  
 2 *United States v. Leon Guerrero*, 847 F.2d at 1366. The officers' statements, considered  
 3 separately or together, were not such as to do so.

4 There was no constitutional violation in admitting the confession, so the rejections  
 5 of this claim by the state courts were not contrary to, or an unreasonable application of,  
 6 clearly established Supreme Court authority.

7 **C. Confrontation Claim – Aguilar Statement**

8 Petitioner contends that his Sixth Amendment Confrontation Clause rights were  
 9 violated by the admission of testimony by Maria de la Cruz Magana that she received a  
 10 call from Efren Aguilar saying that Jose Magana had been shot and that Aguilar saw  
 11 Petitioner leaving the scene.

12 The Confrontation Clause of the Sixth Amendment provides that in criminal cases  
 13 the accused has the right to "be confronted with witnesses against him." U.S. Const.  
 14 amend. VI. The Confrontation Clause bars the admission of "testimonial" statements  
 15 made by persons who are not subject to cross-examination regardless of whether a hearsay  
 16 exception would otherwise allow the admission of the statements. *Crawford v.*  
 17 *Washington*, 541 U.S. 36 (2004). "Testimony . . . is typically a solemn declaration or  
 18 affirmation made for the purpose of establishing or proving some fact." *Id.* at 51 (citations  
 19 and quotation marks omitted); *see id.* ("An accuser who makes a formal statement to  
 20 government officers bears testimony in a sense that a person who makes a casual remark to  
 21 an acquaintance does not."). Although the Court did not precisely define the term  
 22 "testimonial" in deciding *Crawford*, it did bar the state from introducing out-of-court  
 23 statements which are testimonial in nature, unless "the declarant is unavailable, and only  
 24 where the defendant has had a prior opportunity to cross-examine." *Id.* at 59.

25 Petitioner contends that Aguilar's statement to Magana was "testimonial" and thus  
 26 inadmissible under *Crawford*. However, the statement was made to a person who was not  
 27 a government employee or agent, and it was not a sworn or solemn declaration made  
 28 during prior testimony, at a preliminary hearing, before a grand jury, at a former trial or to

1 the police. Nor was it made to in connection with any government proceeding or  
 2 investigation. Rather, it was made to the victim's sister. *Cf. United States v. Manfre*, 368  
 3 F.3d 832, 838 (8th Cir. 2004) (statements made to declarants's family members not  
 4 "testimonial" under *Crawford*). Petitioner has pointed to no authority, nor is the court  
 5 aware of any, suggesting that such remarks are "testimonial" for purposes of the  
 6 Confrontation Clause under *Crawford*. Indeed, *Crawford* itself suggests to the contrary.  
 7 *See Crawford*, 541 U.S. at 51 ("An accuser who makes a formal statement to government  
 8 officers bears testimony in a sense that a person who makes a casual remark to an  
 9 acquaintance does not.")

10 In any event, where, as here, the Supreme Court has never squarely addressed  
 11 whether a particular type of statement is testimonial, a state court's admission of such  
 12 statement at trial is not "contrary to" clearly established Supreme Court precedent or an  
 13 "unreasonable application" of *Crawford*, under 28 U.S.C. § 2254(d)(1). *See Moses v.*  
 14 *Payne*, 543 F.3d 1090, 1099-1100 (9th Cir. 2008) (finding state court's admission of  
 15 victim's out-of-court statements to emergency room physician as non-testimonial  
 16 statements not contrary to clearly established federal law or unreasonable application  
 17 thereof, because Supreme Court had never "squarely addressed" whether statements made  
 18 to doctors for purposes of medical treatment and diagnosis were testimonial).

19 In sum, the admission of Aguilar's non-testimonial statement to Magana did not  
 20 violate Petitioner's rights under the Confrontation Clause, and Petitioner is not entitled to  
 21 habeas relief on this claim.

22 **D. Confrontation Claim – Unavailability of Witnesses**

23 As noted above, in *Crawford* the Supreme Court held that the Confrontation Clause  
 24 bars the state from introducing out-of-court statements which are testimonial in nature,  
 25 unless "the declarants is unavailable, and only where the defendant has had a prior  
 26 opportunity to cross-examine." 541 U.S. at 59. Petitioner contends that admission of  
 27 prior statements by absent witnesses Alfredo Ramos, Rene Soriano, and Jose Adrian  
 28 Zerpas violated his confrontation rights because there was an insufficient showing that

1 they were unavailable.

2 A district attorney's office investigator, Richard Babwin, testified that he attempted  
 3 to locate Ramos. Babwin made "several computer inquires with driver's licence inquires,  
 4 prior arrests, addresses, data bases that we have access to . . ." without success. (Ex. 3,  
 5 vol. 5 at 394.) When shortly before trial the defense informed him that they had managed  
 6 to serve Ramos and gave Babwin an address, Babwin twice went to the address, and when  
 7 there was no answer, left business cards with notes asking Ramos to call. (*Id.* at 395.)  
 8 Ramos did not respond. (*Id.*) Babwin subsequently learned that Ramos had been evicted  
 9 and had left no forwarding address or other information that would allow him to be  
 10 located. (*Id.*) Babwin opined that there was nothing more he could do to find Ramos.

11 (*Id.*)

12 District Attorney office investigator Brian Geer testified about his attempts to find  
 13 Adrian Cerpas. He ran an "Accurint" database search for Adrian, and also ran searches for  
 14 Eva Cerpas, purportedly Adrian's sister, and Mario Antonio Cerpas Mendoza, who he  
 15 believed to be Adrian's brother. (*Id.*, Vol. 2 at 12.) From the computer search for  
 16 Adrian's brother he discovered an alias for Adrian, and that Adrian had an unserved  
 17 warrant outstanding. (*Id.*) There were addresses for "these people," but they could not be  
 18 found. (*Id.* at 13.) Cerpas was not at the address the prosecutor's office had from the first  
 19 trial. (*Id.* at 13-14.) Geer also ran searches for a more current address from drivers'  
 20 license information, social security, and a criminal justice database. (*Id.* at 13.) He then  
 21 turned the investigation over to Babwin, the investigator who had attempted to find  
 22 Ramos. (*Id.*) Babwin ran additional computer searches and checked addresses, without  
 23 success. (*Id.* at 18.) He also turned the warrant over to the San Jose police department,  
 24 again without success. (*Id.*) His opinion was that there was no further investigation he  
 25 could do to find Cerpas. (*Id.*)

26 Geer also attempted to find Rene Soriano. (*Id.* at 14.) He checked drivers' licence  
 27 and criminal records and found nothing. (*Id.*) He ran an Accurint check for a pseudonym,  
 28 Rios, Soriano was known to use, and discovered that Soriano was Ramos' brother-in-law,

1 but of course the prosecutor's office also was unsuccessful in finding Ramos, so that was  
 2 of little help. (*Id.* at 14-15) He obtained an address and phone number for Soriano from  
 3 the San Jose police department, but Soriano was not at the address and "nobody knew  
 4 anything about them." (*Id.* at 15.) The search was then turned over to Babwin. (*Id.*)  
 5 Babwin made additional computer inquiries, and attempted to search California  
 6 employment records for Soriano but was frustrated by not having a social security number  
 7 for him. (*Id.* at 19.) He also checked drivers' licence records for Soriano and his wife and  
 8 San Jose police and jail records, again without success. (*Id.*) There were no addresses left  
 9 that he had not checked out, and he did not believe there was anything more he could do to  
 10 find Soriano. (*Id.*)

11 The trial court held that Cerpas and Soriano were unavailable. (*Id.* at 20). It also  
 12 held that Ramos was unavailable. (*Id.*, vol. 5 at 396). Petitioner's state habeas petition  
 13 raising this issue was denied in a reasoned opinion by the Santa Clara Superior Court.  
 14 (Ex. 15 at 4.) Petitions containing the same claims were denied without comment by the  
 15 California Court of Appeal and the California Supreme Court. (Ex. 18, 19.)

16 It is the government's burden to show that the witness is "unavailable." *Terrovona*  
 17 *v. Kincheloe*, 852 F.2d 424, 427 (9th Cir. 1988). This requires that the prosecutor make a  
 18 good faith effort to obtain the witness's presence. *Barber v. Page*, 390 U.S. 719, 724-25  
 19 (1968).

20 In light of the testimony summarized above, the conclusion of the trial court that the  
 21 witnesses were unavailable, and the implied finding that the prosecution made sufficient  
 22 good faith efforts to find them, was correct, and the state courts' rejections of this claim  
 23 therefore was not contrary to, or an unreasonable application of, clearly established  
 24 Supreme Court authority.<sup>5</sup>

25 **E. Sufficiency of the Evidence**

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26  
 27 <sup>5</sup> Petitioner's contention that there was no showing of unavailability at all  
 28 as to Cerpas and Soriano is mistaken, apparently because he failed to notice the  
 hearing transcribed at pages eleven through twenty of the reporter's transcript.

1 Petitioner contends that his due process rights were violated because there was  
 2 insufficient evidence to support his conviction of second degree murder.

3 The Due Process Clause "protects the accused against conviction except upon proof  
 4 beyond a reasonable doubt of every fact necessary to constitute the crime with which he is  
 5 charged." *In re Winship*, 397 U.S. 358, 364 (1970). A state prisoner who alleges that the  
 6 evidence in support of his state conviction cannot be fairly characterized as sufficient to  
 7 have led a rational trier of fact to find guilt beyond a reasonable doubt therefore states a  
 8 constitutional claim, *Jackson v. Virginia*, 443 U.S. 307, 321 (1979), which, if proven,  
 9 entitles him to federal habeas relief, *id.* at 324. The federal court determines only whether,  
 10 "after viewing the evidence in the light most favorable to the prosecution, any rational trier  
 11 of fact could have found the essential elements of the crime beyond a reasonable doubt."  
 12 *Id.* at 319. Only if no rational trier of fact could have found proof of guilt beyond a  
 13 reasonable doubt, may the writ be granted. *Id.* at 324

14 Petitioner contends that the evidence was insufficient because his confession was  
 15 false and other witnesses lied. To some extent this claim is derivative of the contention  
 16 that Petitioner's confession was coerced, a claim rejected above. In the absence of a  
 17 sufficient showing that the confession was involuntary, and therefore not reliable, this part  
 18 of Petitioner's argument fails. In addition, when considering a sufficiency of the evidence  
 19 claim the Court must "view[] the evidence in the light most favorable to the prosecution,"  
 20 *id.* at 319, so must assume that the jury believed the witnesses.

21 Under California law, second degree murder is "defined as an unlawful killing  
 22 committed with malice aforethought. An unlawful killing with malice aforethought,  
 23 perpetrated by certain specified means or that is willful, deliberate, and premeditated,  
 24 constitutes murder in the first degree. A killing in the course of the commission of certain  
 25 enumerated felonies also constitutes murder in the first degree. Second degree murder is  
 26 an unlawful killing with malice aforethought, but without the elements that elevate an  
 27 unlawful killing to first degree murder." *People v. Robertson*, 34 Cal.4th 156, 164 (2004)

1 (citations omitted). “An unlawful killing may constitute manslaughter rather than murder  
 2 even in the presence of intent to kill or conscious disregard for life, however, if the  
 3 defendant killed in a “sudden quarrel or heat of passion” or in an unreasonable but good  
 4 faith belief in the need to act in self defense.” *Id.* at 165.

5 Here, there was evidence that: Petitioner and the victim were engaged in the drug  
 6 trade; Petitioner had lost a quantity of drugs, about which the victim was angry; Petitioner  
 7 told the victim that the drugs were in a storage locker, knowing that they were not;  
 8 Petitioner obtained a firearm a few days before going to the storage area; Petitioner and  
 9 the victim went to the storage locker, Petitioner armed; Petitioner’s first shot was in the  
 10 victim’s back, undermining any claim to provocation; and the victim’s wounds were in a  
 11 tight pattern and Petitioner ejected misfires from the gun, suggesting intent to kill.

12 These facts, construed in favor of the verdict, are more than sufficient to support it.  
 13 This claim is without merit.

14 **F. Prosecutorial Misconduct**

15 Petitioner contends that the prosecutor committed misconduct, and thereby violated  
 16 his due process rights, when he introduced testimony that included references to visiting  
 17 Petitioner in jail, thereby revealing his “custodial status.” The first reference was in the  
 18 testimony of Alfredo Ramos that was read to the jury. In it Ramos twice referred to  
 19 visiting Petitioner in jail. (Ex. 3, vol. 5 at 403-06.) The second reference was in testimony  
 20 by witness Eva Cerpas, who said that she had visited Petitioner in jail during the first few  
 21 months of his incarceration there. (*Id.*, vol. 6 at 614-15, 637.) These visits occurred in  
 22 2002, before the first trial. (*Id.*, vol. 5 at 398, vol. 6 at 542-543.)

23 Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate  
 24 standard of review is the narrow one of due process and not the broad exercise of  
 25 supervisory power. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). A defendant’s due  
 26 process rights are violated when a prosecutor’s misconduct renders a trial “fundamentally  
 27 unfair.” *Id.*; *Smith v. Phillips*, 455 U.S. 209, 219 (1982) (“the touchstone of due process  
 28 analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the

1 culpability of the prosecutor"). Under *Darden*, the first issue is whether the prosecutor's  
 2 remarks were improper; if so, the next question is whether such conduct infected the trial  
 3 with unfairness. *Tan v. Runnels*, 413 F.3d 1101, 1112 (9th Cir. 2005). A prosecutorial  
 4 misconduct claim is decided “on the merits, examining the entire proceedings to  
 5 determine whether the prosecutor's remarks so infected the trial with unfairness as to make  
 6 the resulting conviction a denial of due process.” *Johnson v. Sublett*, 63 F.3d 926, 929  
 7 (9th Cir. 1995) (citation omitted).

8 A Ninth Circuit case, *United States v. Washington*, 462 F.3d 1124 (9th Cir. 2006),  
 9 involved a similar issue. *Id.* at 1136-37. The court there held that “[a]s with prison garb,  
 10 when a jury is informed that the defendant remained incarcerated\***1137** while waiting for  
 11 trial, this can undermine the presumption of innocence.” *Id.* That is, as an abstract matter,  
 12 prosecutorial references to a defendant's having been in jail can be misconduct.<sup>6</sup>  
 13 *Washington* makes clear, however, that under many circumstances it may not be. The  
 14 *Washington* court noted, for instance, that the impact of referring to a defendant's  
 15 incarceration is not a constant reminder to the jury of his status as it is with prison garb.  
 16 *Id.* at 1137. Moreover, although no state purpose is served by requiring defendants to  
 17 wear prison garb in front of a jury, in Washington's case there was a state purpose for the  
 18 reference to incarceration; the prosecutor hoped the jury would infer from the fact that  
 19 Washington was in jail that if his girlfriend's alibi for him was true she would have come  
 20 forward with it earlier, so he would not have had to spend more time in jail. *Id.*

21 In most cases of a prosecutor asking a question that refers to custodial status or  
 22 calls for a reference to it in the answer, there will not be the sort of “continual” reminder  
 23

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24         <sup>6</sup> In *Estelle v. Williams*, 425 U.S. 501 (1976), the Court held that when  
 25 defendants are forced to wear prison garb to trial, the clothing may create a subtle  
 26 prejudice undermining the presumption of innocence. *Washington*, 462 F.3d at  
 27 1136 (citing *Estelle*, 425 U.S. at 504-05). The “constant reminder of the  
 28 accused's condition implicit in such distinctive, identifiable attire may affect a  
 juror's judgment” and no state policy is served by compelling a defendant to dress  
 in prison clothing before the jury. *Estelle*, 425 U.S. at 504-05.

1 of custodial status that was a concern in *Estelle*, but how frequently the defendants'  
 2 custodial status is mentioned and how much is made of it still can be evaluated; in this  
 3 case, the references by the witnesses were the only mentions of Petitioner's having been in  
 4 jail, and the prosecutor did not refer to his custodial status in closing. The references thus  
 5 were far from "constant," and in fact not even frequent.

6 Furthermore, in this case there was a state purpose in inducing the references to  
 7 Petitioner having been in jail, in that the witnesses' having visited him there tended to  
 8 show their bias in his favor and thus impeach their testimony. That testimony therefore  
 9 was "more relevant and less prejudicial than in the prison garb case." *Id.* (footnote  
 10 omitted).

11 For these reasons, the Court concludes that the prosecutor did not commit  
 12 misconduct. That being so, Petitioner has failed to establish the first step under *Darden*  
 13 for a prosecutorial misconduct due process claim, and thus his claim must fail. *See Tan*,  
 14 413 F.3d at 1112 (first step under *Darden*, 477 U.S. at 181, is to determine whether the  
 15 prosecutor's remarks were improper).

16 Finally, *Washington* is a Ninth Circuit, not Supreme Court, case. There is no  
 17 clearly established United States Supreme Court authority that stands for the proposition  
 18 that a jury's mere knowledge of a criminal defendant's custody status, or the mere mention  
 19 that a defendant was in custody, is unconstitutional. For the reasons discussed above, and  
 20 because there is no Supreme Court authority on the point, the state courts' rejections of  
 21 this claim were not contrary to, or an unreasonable application of, clearly established  
 22 Supreme Court authority.

23 **G. Ineffective Assistance of Trial Counsel**

24 Petitioner contends that his trial counsel was ineffective in failing to adequately  
 25 pursue the issues discussed above.

26 ///

27 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the  
 28 Sixth Amendment right to counsel, which guarantees not only assistance, but effective

1 assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to  
 2 prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish  
 3 that counsel's performance was deficient, i.e., that it fell below an "objective standard of  
 4 reasonableness" under prevailing professional norms. *Id.* at 687-88. Second, he must  
 5 establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a  
 6 reasonable probability that, but for counsel's unprofessional errors, the result of the  
 7 proceeding would have been different." *Id.* at 694. A reasonable probability is a  
 8 probability sufficient to undermine confidence in the outcome. *Id.*

9       It is unnecessary for a federal court considering a habeas ineffective assistance  
 10 claim to address the prejudice prong of the *Strickland* test if the petitioner cannot even  
 11 establish incompetence under the first prong. *Siripongs v. Calderon*, 133 F.3d 732, 737  
 12 (9th Cir. 1998). Similarly, a court need not determine whether counsel's performance was  
 13 deficient before examining the prejudice suffered by the defendant as the result of the  
 14 alleged deficiencies. *Strickland*, 466 U.S. at 697.

15       Petitioner contends that trial counsel should have moved to suppress his confession  
 16 on the grounds discussed in section a, above. For the reasons discussed there, such a  
 17 motion would not have succeeded. Trial counsel cannot have been ineffective for failing  
 18 to raise a meritless motion. *Juan H. v. Allen*, 408 F.3d 1262, 1273 (9th Cir.  
 19 2005) suppressed). For the same reason, Petitioner's contentions that counsel should have  
 20 objected to references to his incarceration and moved to exclude the testimony of Alfredo  
 21 Ramos, Rene Soriano, and Jose Adrian Zerpas, issues discussed above, are without merit.

22       Petitioner's contention that counsel should have objected on hearsay grounds to  
 23 witness Maria de la Cruz' testimony about the phone call from Aguilar is different,  
 24 however, because whether the testimony was hearsay has not been addressed above, it not  
 25 being a proper ground for federal habeas relief. Petitioner cannot prevail on this issue  
 26 either, however, because the failure to object was not prejudicial.

27       De la Cruz testified that Aguilar, who had gone with the victim to meet Petitioner at  
 28 the storage facility, called her and told her that her brother, the victim, had been shot, and

1 that Petitioner had left the storage facility. Petitioner did not deny shooting the victim, but  
 2 rather his defense was that the shooting was in response to his fear of the victim. The  
 3 phone call added nothing incriminating to this. Counsel's failure to object did not  
 4 prejudice Petitioner and was not ineffective. *See Strickland*, 466 U.S. 694.

5 Trial counsel was not ineffective in any of the ways specified by Petitioner. This  
 6 claim is without merit.

7 **H. Ineffective Assistance of Appellate Counsel**

8 Petitioner also contends that appellate counsel was ineffective in not raising the  
 9 above claims. Because the Court has found that the claims all are without merit, failure to  
 10 raise them was not ineffective assistance. *See Miller v. Keeney*, 882 F.2d 1428, 1434 &  
 11 n.9 (9th Cir. 1989)(habeas petitioner alleging ineffective assistance of appellate counsel  
 12 must show reasonable probability that, but for counsel's unprofessional errors, he would  
 13 have prevailed on appeal)(citing *Strickland*, 466 U.S. at 688, 694). This claim is rejected.

14 **III. Certificate of Appealability**

15 The federal rules governing habeas cases brought by state prisoners have recently  
 16 been amended to require a district court that denies a habeas petition to grant or deny a  
 17 certificate of appealability in the ruling. *See* Rule 11(a), Rules Governing § 2254 Cases,  
 18 28 U.S.C. foll. § 2254 (effective December 1, 2009).

19 A petitioner may not appeal a final order in a federal habeas corpus proceeding  
 20 without first obtaining a certificate of appealability (formerly known as a certificate of  
 21 probable cause to appeal). *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A judge shall  
 22 grant a certificate of appealability "only if the applicant has made a substantial showing of  
 23 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must indicate  
 24 which issues satisfy this standard. *See id.* § 2253(c)(3). "Where a district court has  
 25 rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c)  
 26 is straightforward: the petitioner must demonstrate that reasonable jurists would find the  
 27 district court's assessment of the constitutional claims debatable or wrong." *Slack v.*  
 28 *McDaniel*, 120 S.Ct. 1595, 1604 (2000).

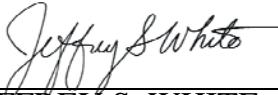
1 For the reasons set out in the discussion of the merits, above, jurists of reason  
2 would not find the result debatable. A certificate of appealability will be denied.

3 **CONCLUSION**

4 Petitioner's requests for an evidentiary hearing are DENIED. The petition for a  
5 writ of habeas corpus is DENIED, and the Court declines to issue a certificate of  
6 appealability. The Clerk shall close the file.

7 **IT IS SO ORDERED.**

8  
9 DATED: December 15, 2009

10   
11 JEFFREY S. WHITE  
12 United States District Judge

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1 FOR THE  
2 NORTHERN DISTRICT OF CALIFORNIA  
3  
4

5 FIDEL C. HERNANDEZ,  
6 Plaintiff,

Case Number: CV08-02539 JSW

7 v.  
8 MATHEW KREMER et al,  
9 Defendant.  
10 \_\_\_\_\_/

11 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
12 Court, Northern District of California.

13 That on December 15, 2009, I SERVED a true and correct copy(ies) of the attached, by placing  
14 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by  
15 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office  
16 delivery receptacle located in the Clerk's office.

17 Fidel C. Hernandez  
18 Folsom State Prison  
19 Prisoner Id F-09157  
P.O. Box 950  
B1-C5-02  
Folsom, CA 95763

20 Dated: December 15, 2009

  
21 Richard W. Wiking, Clerk  
By: Jennifer Ottolini, Deputy Clerk

22  
23 G:\JSWALL\Pro-Se Prisoner\2008\HernandezF2539.RUL.wpd  
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